## STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2000B147

## INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHRISTINE BONICORO,

Complainant,

VS.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, MOUNT VIEW YOUTH SERVICES CENTER,

Respondent.

This matter was heard on August 15, October 3, and December 18, 2000, before Administrative Law Judge (ALJ) Robert W. Thompson, Jr. Joseph Q. Lynch, Assistant Attorney General, represented the respondent. Complainant appeared in person and was represented by Cecilia M. Serna, Attorney at Law.

The ALJ heard testimony from respondent's witnesses Jonathan Hough, Assistant Director; Gerald Sandoval, Correctional Officer III; Penny Brown, Director; Jan Shelley, Safety and Security Officer I (SSO I); Eugene Forbes, SSO I; and Csaba Cseresnyes, Assistant Director of Mount View Youth Services Center and the appointing authority.

In addition to testifying on her own behalf, complainant called witnesses Sing Boutsady, SSO I; Derrick Wallace, SSO I; Diana Ward, SSO I; Heidi Scott, SSO I; Stacy Pooser, SSO I; Jill Glazier, SSO I; Julie Hathaway, SSO I; and Vermella Sangster, SSO I.

Respondent's Exhibits 1, 2, 3, 10 and 13 were stipulated into evidence. Exhibits 4, 5A, 5B, 5C, 5D, 6A, 6B, 6C, 8A, 8B, 8C, 8D, 9A, 9B, 9C, 11, 14 and 15 were admitted

without objection. Exhibits 12 and 17 were admitted over objection. Exhibit 18 was excluded.

Complainant's Exhibits A, B, C, J, K, P, Q, S, T, U, X, FF, GG, JJ, OO, NN and QQ were stipulated into evidence. Exhibits W, Y and VV were admitted without objection. Exhibit AA was admitted over objection. Exhibit UU was excluded.

### MATTER APPEALED

Complainant appeals her disciplinary demotion. For the reasons set forth herein, respondent's action is rescinded.

### ISSUES

- 1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
- 2. Whether the discipline imposed was within the range of available alternatives;
- 3. Whether either party is entitled to an award of attorney fees and costs.

### FINDINGS OF FACT

The ALJ considered the exhibits and testimony, assessed the credibility of the witnesses and made the following findings of fact which were established by a preponderance of the evidence.

 Complainant, Christine Bonicoro, began employment as a Safety and Security Officer I (SSO I) with the Division of Youth Services (now Corrections) in May 1994. In January 1997 she transferred from Gilliam Youth Services Center to Mount View Youth Services Center (MVYSC) as an SSO II and then was promoted to the supervisory position of SSO III. In July 1999, she was assigned to the "front-end" night shift, working from 6:15 p.m. to 6:45 a.m. as the only on-campus supervisor. She rotated her time among seven buildings.

- 2. At an unspecified time, it came to the attention of Penny Brown, Director of MVYSC, that youth were abusing their telephone privileges on the night shift. She ordered an investigation, and it was learned that there was an excessive amount of telephone calls by residents on both the day shift and the night shift. (See Ex. J.)
- 3. Based on an investigation that was completed in January 2000, Csaba Cseresnyes, Assistant Director and the appointing authority for complainant's position, issued a notice of a pre-disciplinary meeting to Bonicoro on March 21, 2000, which listed the reasons for potential discipline as follows: "1 Knowledge of and/or participation in giving youth phone calls contrary to program. 2 Knowledge of and/or participation of allowing youth out of rooms contrary to program. 3 Lack of appropriate supervisory oversight of SSO-I behavior with regards to phone use and allowing youth out of their rooms contrary to program. 4 Poor supervisory practices contributing to unsafe working conditions." (Ex. 1.)
- 4. The R-6-10 meeting was held on April 11, 2000. By letter dated May 10, 2000, signed by Csaba Cseresnyes on May 11, Cseresnyes disciplinarily demoted Bonicoro from SSO III to SSO II, with a ten percent reduction in pay effective June 1, 2000, based upon the following factual findings:
  - Staff and youth have stated verbally and in writing that you did indeed have knowledge that youth made unauthorized phone calls and that in fact, you approved a number of these calls personally. Many of the youth involved included potentially dangerous residents on special/restricted programs that should

not have been allowed out of their rooms without a documented need.

These events occurred after a September 1999 incident on your shift in which two dangerous youths were allowed out of their rooms, and became involved in a fight that resulted in three staff injuries. This incident was debriefed at shift change for all staff and was discussed at the supervisor's weekly meeting, i.e., at the 9/29/99 supervisors meeting, specific instructions were given to strictly follow program directives designed to insure safety/security of staff and youth. After this incident, there is no indication that you adhered to sound supervisory practices to ensure safe working conditions for all.

2. In your final evaluation of staff "PC," you failed to take into consideration the fact that he resigned overnight without notice and admitted to you that he had falsified state records. He wrote on the room check sheet the youth was in his room, when in fact phone records indicate he was making an unauthorized phone call....

(Ex. 2.)

- 5. In making his decision to impose disciplinary action, the appointing authority took into consideration a corrective action which Bonicoro had earlier received relating to following the treatment programs of youths on special programs. Bonicoro had grieved this corrective action, and she was successful in her grievance. The corrective action was rescinded and removed from her personnel file on May 10, 2000.
- 6. With respect to the September incident, Cseresnyes did not know who let the residents out, but it was not Bonicoro.
- 7. The one staff person who accused Bonicoro of approving unauthorized phone calls, and which led to the investigation, was Jan Shelley, an SSO I supervised by Bonicoro. Shelley was involved in the altercation that broke out between two residents in September. Vermella Sangster apparently let

the youths out of their rooms, with Shelley's assistance, so they could take a shower. Bonicoro did not direct either staff person to let the residents out of their rooms at that time.

- 8. While Bonicoro's close-out performance evaluation of SSO I PC was a major factor leading to discipline, it did not occur until March 27, 2000, after PC had resigned, and six days after the notice of the reasons for an R-6-10 meeting. (Ex. 4.) Bonicoro did not receive a pre-disciplinary meeting on this issue, and it was not discussed with her by the appointing authority.
- 9. After her demotion to an SSO II, Bonicoro was assigned to the day shift, and the function of evaluating subordinates was removed from her. She still completed performance evaluations, but she did not sign them. She was still a supervisor, and her duties and responsibilities remained about the same. This is the current situation.
- 10. A major issue for Cseresnyes in his decision to demote was that PC, who he believed had filed false documents, could be re-hired by the state because of his good close-out evaluation. The PC performance evaluation had a major impact on his decision to demote Bonicoro.
- Bonicoro's performance ratings beginning June 9, 1998 were Commendable, Good, and Fully Competent. Her close-out evaluation, after she had been demoted, was Needs Improvement, with which she disagreed. (Exs. 5A, 5B, 5C and 5d.)
- 12. On April 3, 2000, Assistant Director Jonathan Hough issued a written reprimand for violating DYC policy by allowing residents to use the phone to twelve staff members, not including Bonicoro. (Ex. QQ.) No other staff

member besides Bonicoro was issued a corrective or disciplinary action regarding this issue.

- 13. Bonicoro has the reputation among her subordinates of strictly adhering to the special programs of the residents, including bedtime and the use of the phones.
- 14. Fights between youths are relatively common on both the day and night shifts.
- 15. Bonicoro did not believe that it was entirely true that PC resigned without notice because he had told both her and her supervisor that he had applied for a position with the Denver Police Department and might have to leave on a moment's notice, so she was not totally surprised when it happened. She rated him Fully Competent because he had been one of the best SSOs under her supervision. Since that time, she has seen some room check sheets on which he wrote false information, and she would rate him lower on that basis today.
- 16. Complainant Christine Bonicoro filed a timely appeal of her disciplinary demotion on May 23, 2000.

#### DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law

judge. *Charnes v. Lobato*, 743 P. 2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Respondent contends that its action was justified because Bonicoro failed to effectively supervise her subordinates and hold them accountable. Even though the appointing authority relied on a prior corrective action that had been rescinded and removed from complainant's personnel file, respondent argues that this was appropriate because the corrective action had been rescinded for reasons of untimeliness, according to the testimony of the appointing authority, rather than merit. Respondent argues that Bonicoro's lack of action led to the altercation in which three staff persons were injured, though there is no supporting evidence. And, respondent contends that giving SSO I PC a good evaluation is cause for discipline, even though the evaluation was not done until sometime after the pre-disciplinary meeting that served as the basis for this discipline.

Complainant sets out a more forceful and persuasive argument, contending first that the evidence is insufficient to lay the blame for the excessive phone calls on Bonicoro and next arguing that she was not given notice that the PC evaluation might be a cause for discipline, that no one talked to her about it before issuing the disciplinary action, that there was no progressive discipline pertaining to the evaluation of subordinates, and that she was wrongfully blamed for the fight between the two residents. Additionally, complainant urges that a rescinded corrective action cannot be used as a basis for imposing disciplinary action.

Beginning with the removed and rescinded corrective action, Rule R-6-9, 4 Code Colo. Reg. 801, provides in pertinent part: "A removed corrective action cannot be considered for any subsequent personnel action." This sentence follows a sentence that says that a corrective action may contain a statement saying that the corrective action will be

removed after a specific period of compliance. The evidence suggests that this disciplinary action was issued right after the agency was informed that the corrective action was rescinded. There is no basis for respondent's contention that an agency may rely on a rescinded corrective action if it was rescinded for untimeliness rather than merit. While the appointing authority testified that it was rescinded for untimeliness, Bonicoro testified that it was rescinded because she proved that it was the day shift supervisor who modified a youth's special treatment program, not her. The evidence concerning the corrective action is skimpy, and no finding is made on this point. Be that as it may, I conclude that a rescinded corrective action cannot serve as a basis for discipline; the corrective action is gone, the same as a corrective action voluntarily removed by the agency. The appointing authority abused his discretion in considering a removed corrective action as support for discipline. In a case in which discipline is imposed in reliance on a corrective action that is later rescinded, the disciplinary action must be reconsidered in that light. But that is not what happened here, where the appointing authority knowingly used a rescinded corrective action as a basis for imposing disciplinary action. This act of bad faith, itself, is reason enough to overturn the disciplinary action and award fees and costs.

Rule R-6-10, 4 Code Colo. Reg. 801, provides that, "When considering discipline, the appointing authority must meet with the certified employee to present information about the *reason* for potential discipline and give the employee an opportunity to respond...." (Emphasis supplied.) This principle was upheld in *Bourie v. Dep't of Higher Education*, 929 P.2d 18, 22 (Colo. App. 1996) (employee must be provided with notice of the purpose of the pre-disciplinary meeting *and the matters to be discussed*) (emphasis supplied). In the present case, the close-out evaluation of PC, which the appointing authority found objectionable and used as a basis for discipline, did not even take place until after the R-6-10 meeting. If this incident were to serve as a basis for discipline, it was incumbent upon the appointing authority to notice and hold a pre-disciplinary meeting on this issue, and then take into account the possible need for progressive

discipline. R-6-10; R-6-2, 4 Code Colo. Reg. 801. By not doing so, the appointing authority abused his discretion.

The credible evidence is insufficient by a preponderance standard to demonstrate that complainant was the cause of the telephone abuse or that she failed to hold her subordinates accountable. Respondent did not carry its burden to prove just cause for the discipline imposed. *Kinchen, supra*. The most respondent proved was that residents were making an excessive amount of phone calls, but this fact is not disputed. As to the fight that resulted in staff injuries, the appointing authority testified over and over that three staff members were injured, but he provided no details, such as the type or seriousness of the injuries, or the manner in which they occurred. He did not even know the circumstances of the two youths being let out in the first place. There is no evidence that complainant directed that the youths be let out at the same time, or was responsible in any way for the fight or the injuries.

Respondent's case rests for the most part on the testimony of Jan Shelley, the only former subordinate of complainant to testify "against" her. Shelley has a reputation for untruthfulness in the workplace, according to the unrefuted testimony of two witnesses. The other former subordinate to be called by respondent was Eugene Forbes, who testified that Bonicoro was very kind to residents and staff and whose most damaging testimony was that residents in his pod sometimes bypassed him and went directly to Bonicoro "because she was so nice," which tends to prove that she was a nice person, not that she was an incompetent supervisor. Assistant Director Hough testified that he observed the final ten minutes of a 40-hour training session in which Bonicoro participated and made a statement about being friends with subordinates, which "shocked" him. This is hardly just cause for immediate discipline.

By contrast, complainant presented as witnesses eight former subordinates who testified that she followed all of the special programs of the residents and enforced the

rules. Bonicoro, herself, testified in a direct, straightforward and unhesitating manner.

Her testimony is deemed credible and is given substantial weight.

Respondent's personnel action of demoting complainant was taken in bad faith and was

groundless and frivolous. Consequently, an award of attorney fees and costs is

required under section 24-50-125.5, C.R.S., of the State Personnel System Act ("shall

be liable"). See Coffey v. Colorado School of Mines, 870 P.2d 608 (Colo. App. 1993)

(awarding fees and costs for "groundlessness"). See R-8-38, 4 Code Colo. Reg. 801,

for definitions.

**CONCLUSIONS OF LAW** 

1. Respondent's action was arbitrary, capricious and contrary to rule or law.

2. The discipline imposed was not within the range of available alternatives.

3. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is rescinded. Complainant shall be reinstated to her former

position with full back pay and benefits. Respondent shall pay to complainant her

attorney fees and costs incurred in pursuing this litigation.

DATED this \_\_\_\_ day of January, 2001, at

Denver, Colorado.

Robert W. Thompson, Jr. Administrative Law Judge 1120 Lincoln Street, Suite 1420

Denver, CO 80203

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# NOTICE OF APPEAL RIGHTS

### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

## PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

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### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

# ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

## CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of January, 2001, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Cecilia M. Serna, Esq. Cecilia M. Serna, P.C. 1401 Saulsbury Street, Suite 203 Lakewood, CO 80215

and in the interagency mail, addressed as follows:

Joseph Q. Lynch Assistant Attorney General Employment Section 1525 Sherman Street, Fifth Floor Denver, CO 80203

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